IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1923.

No. 358.

The United States of America,
Appellant,

vs.

Title Insurance and Trust Company, a Corporation; Security Trust and Savings Bank, a Corporation; Harry Chandler, O. P. Brant, M. H. Sherman and E. P. Clark,
Appellees.

BRIEF FOR APPELLEES.

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STATEMENT OF FACTS.

On May 9, 1863, the United States issued its patent in due form covering the tract of land involved in this action to the predecessors in interest of these appellees. On May 13, 1901, in the case of *Barker v. Harvey,* 181 U. S. 481,

this court in an unanimous decision held that the claims urged in this action on behalf of the Indians were without merit and that the grantees under such a patent held their title free from such claims. Ever since that date this decision has stood as the settled and recognized law. These appellees acquired the title to the lands in question in September, 1916, acquiring the title conveyed to the original grantees by the United States patent. In the case at bar the Government seeks to take from these appellees the possession and right to use a tract of 5,374 acres of the land so originally patented and so acquired by these appellees, and to secure a decree adjudicating that the right to possess and use said lands is not in these appellees but is in certain Indians or a certain alleged Indian tribe. Were the contention of the Government sustained, these appellees so holding this large tract of land under a patent of the United States, would have the right and perhaps the duty to pay taxes on it and substantially nothing else.

The Law Governing This Case Is Settled by Numerous Decisions of this Court and Has Become a Rule of Property.

These appellees contend that the decision in *Barker v. Harvey, supra*, settled and established the law. That decision has stood for nearly a

quarter of a century. On the basis of that decision (and other earlier decisions of this court which led up to and pointed the way to the decision in *Barker v. Harvey*), property transactions that are literally innumerable have taken place throughout the state of California. In reliance upon the law thus settled, investments running into hundreds upon hundreds of millions of dollars have been made. The legal world and the business world have understood that the law so announced by this court and universally recognized was the settled law and have acted accordingly. A growth and development which is one of the most remarkable things of its kind in history has occurred in California since the decision in *Barker v. Harvey*. Great tracts of land have been bought and sold, and have been subdivided into small tracts on which thousands of people have erected their homes, the purchases being made in reliance upon validity of the title as established by these decisions. Towns and even cities have grown up upon land which would be subject to the same claims asserted in this action, all in reliance upon the fact that the law upon the questions presented in this action was definitely and forever settled. These appellees purchased the extensive property here involved in like reliance. But they are a few of the many, many thousands of persons who have acted accordingly.

It would be difficult indeed, we submit, to find a case wherein it is more essential to apply the principle of *stare decisis* or wherein it is more indispensable to prevent working terrible injustice and hardship upon multitudes of innocent people, that long settled and established principles of law fixing property rights be not overturned.

In view of the facts to which we have adverted, it is indeed surprising that the Government should now be attempting to induce this court to overrule its previous decisions and overturn the rules of property so established, acquiesced in and acted upon for nearly a quarter of a century, with the tremendous confusion of titles affecting tens of thousands of people that would follow and the general chaos and confusion that would result from such action. This court has time and again expressed itself in most positive terms not only to the effect that it would not overrule its decisions under such circumstances but even that it would not consider arguments directed toward such action. We shall refer to but a few of such expressions by this court.

In *Minnesota Company v. National Company*, 3 Wall. 332, a question was presented involving the rights obtained by a lessee under a lease of mineral lands made by the Secretary of War. A case involving the same question

had been previously heard and determined by this court. The record shows that the court declined to hear arguments upon the merits of the question, and this court, speaking through Mr. Justice Grier, expressed itself as follows:

> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments."

United States v. Heirs of Watterman, 14 Peters 478. The case was submitted to this court involving the effect of a grant of land made by the government of Florida before the cession of Florida to the United States. The court having decided the effect of these grants in previous decisions it did not go into the

merits of the controversy at all but simply entered its decree affirming the validity of the title of the grantee.

In *McDougal v. McKay*, 237 U. S. 372, a question was presented involving the rights of descent with reference to certain Indians. The exact point apparently had not been decided by this court but had been decided by the Circuit Court of Appeals and by certain decisions of the state of Oklahoma in which state the land involved was located. This court quoted from a decision of the Circuit Court of Appeals as follows:

> "Many titles to land on the eastern side of this state have been acquired on the strength of this decision and to such an extent that the same has become a rule of property there,"

and affirmed the rule so announced.

We might elaborate at great length and by the citation of numerous decisions, but feel that to do so would be a work of supererogation. It would be difficult to conceive of a case wherein a rule of property has become more definitely fixed and established than is here involved. The decisions of *Beard v. Federy*, 3 Wall. 478, decided in 1865; *Botiller v. Dominguez*, 130 U. S. 238, decided in 1889; *Knight v. United States Land Ass'n*, 142 U. S. 161, decided in 1891; *Thompson v. Los Angeles Farming & Milling*

Co., 180 U. S. 72, decided in 1901, and *Barker v. Harvey*, 181 U. S. 481, decided in 1901, and other similar cases hereinafter cited, have established a rule of property of the greatest practical importance, which as pointed out has stood unchallenged and unquestioned for approximately a quarter of a century at least and which has been acted upon as finally and permanently establishing the law by so many people in so many transactions that they can safely be numbered in the thousands if not the tens of thousands. Seldom if ever, we submit, has there been a case which more thoroughly and imperatively demands the application of the principle that settled rules of property will not be disturbed or even reconsidered.

We will now briefly review these decisions beginning with the one which has stood as the final word—*Barker v. Harvey*, 181 U. S. 481. That was an action brought in the Superior Court of the county of San Diego, California, to quiet title. Plaintiffs claimed title by virtue of a patent issued to one John J. Warner, their predecessor in interest, said patents being in confirmation of two grants made by the Mexican Government. The claim of the defendants was thus epitomized in the statement of the case by Mr. Justice Brewer (p. 482):

> "On the other hand, the defendants do not claim a fee in the premises but only a right of permanent occupancy by virtue of

> the alleged fact that they are Mission Indians, so called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory; insisting, further, that the government of Mexico had always recognized the lawfulness and permanence of their occupancy, and that such right of occupancy was protected by the terms of the treaty and the rules of international law."

The trial court found that the plaintiffs held the ownership in fee simple; that the defendants had no right or interest therein and plaintiffs had a decree accordingly. It appeared that Warner, the original patentee, had filed a petition with the Land Commission (created by the Act of March 3, 1851), praying for the confirmation of his title which was based on two Mexican grants; that a decree of confirmation had been entered and that the same had been confirmed by the courts. It also appeared that in the trial court the defendants offered copies of the expedientes of both of the Mexican grants referred to in the patent and some evidence as to occupation by the defendants and their ancestors, but that the evidence of occupation had been stricken out by the court and that it had also stricken out the evidence of the Mexican grants upon which the patent was issued. As was stated by this court (p. 486):

> "Upon the evidence, therefore, that was received by the trial court there could be no doubt of the rightfulness of the decree, and the question presented by the record to the Supreme Court of the state was whether there was error in striking out the testimony offered on behalf of the defense."

The patent there involved contained the same provision with regard to the rights of third persons as is contained in the patent involved in the case at bar, to-wit, the provision that "neither the confirmation of this claim nor this patent shall affect the interests of third persons." On appeal to the Supreme Court of the state of California the judgment of the trial court was affirmed. (*Harvey v. Barker,* 126 Cal. 262.) In affirming the decision the Supreme Court of California considered itself bound by the decision of the Supreme Court of the United States in *Beard v. Federy,* 3 Wall. 478; *Botiller v. Dominguez,* 130 U. S. 238; *Knight v. United States Land Ass'n,* 142 U. S. 201, and *More v. Steinbach,* 127 U. S. 80, and was constrained to and did overrule its previous decision in the case of *Byrne v. Alas,* 74 Cal. 628. From the decision of the Supreme Court of California the case was brought to this court by writ of error. As already noted, this court unanimously affirmed the judgment of the Supreme Court of California and confirmed the decree quieting the title of the patentee (or rather his successor in

interest) as against the claims of the Indians and holding that there was no error in striking out both the evidence as to the Mexican grants upon which the patent was issued and the evidence as to occupancy by the defendants and their ancestors.

This decision therefore squarely established the principle of law that the holder of a patent from the United States took title free and clear of any claims of the Mission Indians unless the claims of such Indians had been presented to and confirmed by the Land Commission. In other words, it directly decided and settled the principle governing the case at bar.

It is probably unnecessary to quote extensively from this decision. Perhaps we may, however, call attention briefly to certain phases of the decision. It was argued that whatever rights the Indians may have had prior to the cession of California to the United States were protected by the Treaty of Guadalupe Hidalgo. Overruling this contention this court held that whatever duty that treaty may have imposed for the securing of such rights belonged to the political department of the government and that this duty had been fully performed by the Act of 1851 establishing the Land Commission, and that it was perfectly legal and reasonable to require all persons claiming a right in land to present their claims to said commission for adjudication

and to provide that a failure to present such claims and have them adjudicated worked an abandonment of all such rights. The court pointed out that it had already held in *Botiller v. Dominguez,* 130 U. S. 238, and numerous other cases down to and including *Florida v. Furman,* 180 U. S. 402, and that this applied not only to incomplete or inchoate rights or title (such as are here claimed on behalf of the Indians) but even to complete and perfect titles, and that even such complete and perfect titles were abandoned and lost if not presented to the commission for adjudication. Referring to the act the court quoted from *Thompson v. Los Angeles Farming and Milling Co.,* 180 U. S. 72, as follows:

> "'Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the Act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted *but required* all claims to be presented to the board, and *barred all from future assertion* which were not presented within two years after the date of the act.'" (Italics ours.)

It was contended there, as it is contended at great length in the brief of appellant in the

case at bar, that the Indians were not required to present their claims for occupation of lands to the Land Commission. This contention was expressly overruled. (See, particularly, that portion of the opinion appearing on pages 490-492.) Among other things, this court said (p. 490):

> "As between the United States and Warner, *the patent is as conclusive of the title of the latter as any other patent from the United States* is of the title of the grantee named therein. As between the United States and the Indians, *their failure to present their claims to the land commission within the time named made the land within the language of the statute 'part of the public domain of the United States.'* * * * So far, therefore, as these Indians are concerned the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the Government, and the Government has conveyed to Warner." * * *
>
> "If these Indians had any claims founded on the action of the Mexican government *they abandoned them by not presenting them to the commission for consideration,* and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property.' If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore, they do not come within the provision of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to per-

> manent occupancy of land is one of far-reaching effect, *and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States.* There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, *which is one of private property,* antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, *if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy."* (Italics ours)

Of course, if whatever rights the Indians had (assuming they had any) were lost by not presenting them to the commission for consideration, appellant's whole case must fall to the ground. As already pointed out, not only did the court hold that this was the effect of non-presentation upon the inchoate rights claimed by the Indians, but even upon a full and perfect title. Appellant seeks to break the force of this decision by saying that it does not claim a *permanent* right of occupancy. Throughout this case it has argued that the rights it is contend-

ing the Indians have continue "throughout the successive generations through which the tribe endures." Whether the argument is thus directly expressed it is the clear effect of its argument in this court. But this argument at most goes only to the time element of the property right named, not to the nature or quality of it. The time element, as heretofore pointed out, was an immaterial consideration under the Act of 1851.

It was contended in *Barker v. Harvey,* as it is contended at great length in the case at bar, that the rights of the Indians were saved by the provision in the patent, which was identical with the provision in the patent here involved, to the effect that the patent should not "affect the interests of third persons." The court overruled this contention in the following language (pp. 490-491):

> "It is true that the patent, following the fifteenth section of the act, in terms provides that the patent shall not 'affect the interests of third persons,' but who may take advantage of this stipulation? This question was presented and determined in *Beard v. Federy,* 3 Wall. 478, and the court, referring to the effect of a patent, said (pp. 492, 493):
>
> " 'When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore,

> record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. * * * The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles such as will enable them to resist successfully any action of the government in disposing of the property.' "

It was contended in *Barker v. Harvey,* as it is contended here, that "the Indians were prior to the cession the wards of the Mexican government and by the cession became the wards of this government; that therefore the United States are bound to protect their interests and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards." This contention the court answered by pointing out that this obligation is one which rests upon the political department of the government and that "this court has never assumed, in the absence of congressional action, to determine what would have been ap-

propriate legislation or to decide the claims of the Indians as though such legislation had been had." The court then pointed out that Congress had expressly required the land commission to report on these Indians; that it is assumed that the commission has performed that duty and that Congress did all that it deemed necessary in the matter, and if it failed to act, it is fairly to be deduced that Congress considered that they had no claims which called for special action. (See pages 492-493.)

It is thus to be seen that *Barker v. Harvey* expressly takes up and answers nearly every argument advanced by appellant in the case at bar, and that it does directly and in terms decide adversely every contention which appellant here makes. Indeed, when the court decides that whatever rights the Indians had or claimed, they *abandoned them* by not presenting them to the land commission within the time specified in the statute, the entire case of appellant falls to the ground. Appellant in the case at bar presents two branches to the argument as to why the Indians were not required to present their claims: First, that their claims antedated either the Mexican or the American law; second, that their claims have been recognized and fortified by the language of the Mexican grant. But as has already been noted in *Barker v. Harvey*, the court directly met and overruled both these

contentions in the language which we have quoted from pages 491-492 of the opinion. However much learned counsel may dwell upon and seek to magnify minor and immaterial differences between the facts in *Barker v. Harvey,* and the case at bar, it cannot be disputed that that decision squarely holds that by failing to present them to the land commission, the Indians waived and abandoned any claim that they had either arising out of natural law or of any confirmation by the Mexican government.

After deciding these matters the court proceeds briefly to note the fact that one of the Mexican grants contained an inhibition against interfering with the Indians while the other did not, and also the fact that it appeared that there was some evidence of abandonment of possession. It will be recalled that all evidence relating to possession had been stricken out by the trial court and no finding was made on the point. This court pointed out (p. 493) that there was sufficient evidence "to call for a finding thereon if the fact of occupation was controlling." By affirming the judgment it held that the fact of occupation or abandonment was not controlling. This was in accordance with the earlier statement of Mr. Justice Brewer to the effect that the question presented was whether there was error in striking out the testimony offered for the defense. This statement and

decision are directly in accordance with the contentions we are making. Learned counsel for appellant apparently recognizing the fact that the decision in this case, as well as in the earlier cases to which we have called attention, directly overrules his contentions, seeks to distinguish this case from Barker v. Harvey by contending that this court *might* have placed its decision upon the ground of abandonment by the Indians. It is a sufficient and complete answer to this claim, however, that this court did not in fact place its decision upon that ground, but did decide the case upon the grounds already indicated. Moreover, since as the court pointed out in the language just quoted, there was sufficient evidence to call for a finding "if the fact of occupation was controlling," and since there was no finding on it, the court could not have placed its decision upon this ground but would have been compelled to reverse the case for a finding upon this issue had it desired to decide the case on grounds other than those on which it did decide it. Moreover, no effect could be given to the provisions of the Mexican grant referring to the Indians' right of occupancy involved in the Barker case any more than effect can be given to the similar provision contained in the Mexican grant here involved, since no claim was filed with the Land Commission, nor was any such provision contained in the United States patent.

Learned counsel next seeks to distinguish the case on the ground that the court in its opinion refers to the claim of the Indians as being a claim to a permanent right of occupancy. But as pointed out, the question involved is as to the nature and character of the rights asserted, not the length of time during which it is claimed they continue. Moreover, the claim of appellant throughout this case has been that the right of the Indians which they assert is as permanent as the existence of the tribe, which is all that was claimed in *Barker v. Harvey*. Still further, counsel concede that under their claim the sovereign may at any time extinguish the asserted rights of the Indians. In *Barker v. Harvey* this court directly held that under the Congressional Act of 1851 whatever rights, if any, the Indians had were extinguished if they failed to present them to the Land Commission. It will thus be seen that the attempted distinctions are utterly invalid and futile; that if anything they react against appellant, since if the court had taken the view of the law which appellant is urging, it would have been necessary for it to reverse the judgment on account of the fact that there was no finding as to occupancy or abandonment of the premises involved.

Learned counsel contend that this carefully considered decision of the court, analyzing the problems and questions involved and reviewing

at length the numerous previous decisions of the court on the same subject, is mere dictum. This indicates the stress under which they are laboring in an effort to escape the controlling weight of this and the earlier authorities. It makes pertinent the observations of this court with reference to a similar contention made in Botiller v. Dominguez, 130 U. S., where this court said (p. 254):

> "It is said by counsel for defendant in error that there would never have been any doubt upon this question were it not for certain dicta in the cases here referred to. We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, 'dicta,' for we feel bound to say, that they were observations pertinent to the matter under consideration, and seem to have met the entire approbation of the court in whose behalf they were uttered; and as they embraced a very considerable period of time, during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered."

It may not be inappropriate in this connection to call attention also to similar observations of the Supreme Court of California in *Harvey v. Barker* when before that court, wherein it is said (126 Cal. 275-276):

"Appellants' counsel, to ward off the effect of these decisions, particularly the Botiller case, characterize much of the language used in such opinions as pure *dictum*. But the opinion in this latter case, as well as the others quoted, have been referred to and adopted by the same court in subsequent cases. In *Knight v. United States Land Assn., supra,* the court say: 'The patent, being thus conclusive, can only be resisted by those who hold paramount title to the premises from Mexico and antedating the title confirmed.' (De Guyer v. Banning, 167 U. S. 723.)

"When unable to meet and answer opinions of the court, it is a custom of counsel, which would be 'more honored in the breach than the observance,' to characterize the language used as mere *dictum*. The answer to such criticism is well stated in the Botiller case itself: 'We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, *dicta*, for we feel bound to say that they were observations pertinent to the matter under consideration, and seem to have met the entire approbation of the court in whose behalf they were uttered, and, as they embrace a very considerable period of time during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered.' "

The decisions of this court rendered in the series of cases beginning with *Beard v. Federy*, 3 Wall. 478, rendered inevitable the decision

which was rendered in *Barker v. Harvey*. We will now briefly advert to that line of cases. In *Beard v. Federy* the facts were these: The Bishop of Monterey had presented a claim to the land commission for confirmation to him of certain Mission lands, claiming that under the laws of Spain and the laws of Mexico he was entitled to church property without any formal grant. His claim was confirmed by the commission and the patent issued in due course. Federy, claiming title through the Bishop of Monterey, brought an action of ejectment against Beard, who claimed under an alleged grant of the same lands from one Pico, governor of California. This alleged grant, however, had never been presented to the commission for confirmation. On the trial, the court excluded all evidence of the grant of Governor Pico. Judgment was rendered in favor of Federy and defendant appealed to the Supreme Court of the United States. The judgment was affirmed. The case received elaborate consideration in an opinion written by Mr. Justice Field and concurred in by the entire court. It was held that the legislation creating the land commission and providing that all claims not presented to it within a specified period for confirmation should be considered and treated as abandoned, is entirely constitutional; that the patent issued by the government, so long as it remains unva-

cated, is conclusive as against the government and all parties claiming under it; that the term, "third persons," mentioned in the fifteenth section of the act (against whom a decree and patent are not conclusive), does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property. The opinion is too long to quote in full but we respectfully refer the court to the official report. We desire to emphasize only one or two points. After holding that all claims of right in or to real estate must be presented to the commission or else they would be lost, the court directly held (p. 489) that this applied even to rights which "rest solely in the general law of the land." The court, referring to the Act of 1851, said:

> "That act does not define the character of the right or title, or prescribe the kind of evidence by which it shall be established. It is sufficient that the right or title is derived from the Spanish or Mexican government, and it may in some instances rest in the general law of the land, as is the case usually with the title of municipal bodies, under the Spanish and Mexican systems, to their common lands."

Thus as early as 1865 we find this court squarely overruling the claim now asserted by appellant that the Indians' claim need not have

been presented to the land commission because, as it claims, that right rests in part on recognition by the general law of the land, either as based on rights existing before the Spanish conquest or for any other reason. Again on page 490 the court points out that the effect of the Act of Congress is that "if the claims be not thus presented within the period designated, it will not recognize nor confirm them, nor take any action for their protection, but that the claims will be considered and treated as abandoned." On pages 492 and 493 the court analyzes at length the effect of the patent and emphasizes the fact that it is and must necessarily be final and conclusive. In this connection and on page 493 the court uses the language which has been quoted with approval many times until it has become the classic statement of this proposition with reference to the provision as to "third persons."

> "The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

In *Botiller v. Dominguez,* 130 U. S. 238, the facts were as follows: Plaintiff brought an action in ejectment against defendants. The title of plaintiff was a grant made by the gov-

ernment of Mexico, but no claim thereon had ever been filed with the commission, and hence no patent had issued. Defendants claimed no title under the Mexican government, but were settlers who had entered upon the land to take up preemption or homestead claims. Plaintiff proved a perfect title under the Mexican law and the trial court rendered judgment in his favor. This was affirmed by the Supreme Court of California. The case was then appealed to this court. The question was squarely presented as to whether a title that was *perfect* under the Mexican law was lost through not being presented for confirmation to the commission. In a unanimous decision delivered by Mr. Justice Miller, it was held that the title even though perfect under the Mexican law was lost and abandoned if not presented for confirmation, and the judgment of the California courts was reversed. The opinion in this case also is too long for extensive quotation. The court pointed out that a final and authoritative determination of titles in the new country was necessary; that it must be known as to what property some person or persons could claim a private title or right and as to what property the government of the United States could say "this is my property," and so make any disposition as it chose; that this necessity applied with equal force to perfect titles and to imperfect or inchoate titles;

that there was nothing unconstitutional or improper about requiring all persons who claim titles of any kind or nature to come into court and set them up; that

> "It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them."

The court quoted from previous opinions showing that it had already been held that the Act of 1851 comprehended "all private claims to land in California" and also

> "These acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation, *are treated as non-existent*, and the land as belonging to the public domain." (Page 253.) (Italics ours.)

The court thereupon held and determined that even though defendant in error had a complete and perfect title under the Spanish law, still that having failed to present it to the land commission, the title was abandoned, relinquished and lost. The decision reviews the previous decisions of the court at considerable length, including *Fremont v. United States*, 17 How. 542; *United States v. Fossatt*, 21 How. 445; *United States v. Castillero*, 2 Black. 17,

158; *Newhall v. Sanger*, 92 U. S. 761, and *More v. Steinbach*, 127 U. S. 70. Inasmuch as these cases are reviewed in the opinion in the Botiller case we will not attempt to review them here.

In *Knight v. U. S. Land Association*, 142 U. S. 161, there was involved the question of the right of the Pueblo of San Francisco to certain lands lying below tidewater. The case was a somewhat complex one on account of various complicated facts of no particular importance to the case at bar. The importance of the decision for the purpose of the case at bar is this. The court held (page 184) that the patent which it issued to the Pueblo of San Francisco upon confirmation of its claim by the land commission

> "is conclusive not only as against the government and all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court."

The court then reviews a number of its previous decisions, including *Beard v. Federy*, *supra*, from which it quotes at length.

In *Thompson v. Los Angeles Farming & Milling Co.*, 180 U. S. 72, plaintiff sued in eject-

ment, the suit involving certain lands of the Rancho ex-Mission de San Fernando. Plaintiff derived title from a deed of grant made by Governor Pico, then governor of California, in 1846. This grant had been confirmed by the commissioners and a patent issued on such confirmation. The defense urged was that the grant by Governor Pico was illegal and invalid on its face for two reasons: First, because it was *ultra vires* of this authority, and second, because the lands attempted to be granted were lands belonging to the Mission of San Fernando and not legally subject to the granting power of the governor. It was also claimed that the Board of Land Commissioners had no jurisdiction over the matter because these facts appeared on the face of the proceedings before that board. In the trial court and the Supreme Court of California plaintiff recovered judgment, and on appeal to this court the judgment was unanimously affirmed. In the course of the opinion delivered by Mr. Justice McKenna, referring to the broad powers of the Board of Land Commissioners, the court said:

> "Legal procedure could not afford any better safeguards against error. Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the

purpose of the Act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted *but required all claims* to be presented to the board, and *barred all from future assertion* which were not presented within two years after the date of the act." (Italics ours.)

The court then cited and quoted from *Beard v. Federy, supra,* and *More v. Steinback,* 127 U. S. 70, reaffirming the doctrine that the only persons who might question the conclusive effect of the patent were those who held superior titles to enable them to resist successfully any action of the government in disposing of the property.

A number of other cases might be cited, but the foregoing are, we think, sufficient to establish beyond peradventure of a doubt the proposition that even if the case of *Barker v. Harvey* had never been decided, the case attempted to be made out by the appellants here must necessarily have failed. The effect of these decisions, as we have already pointed out, was to lead the Supreme Court of California in deciding *Barker v. Harvey* to overrule its previous decisions. It is clear, therefore, that until these cases, as well as *Barker v. Harvey,* are overruled, the case attempted to be made by appellants must fall.

In view of appellant's contention that the asserted rights of the Indians may have been merely recognized or permitted by the Mexican law and not derived from it, it may not be inappropriate to quote one paragraph from the decision of the Supreme Court of California in *Harvey v. Barker,* which tersely and accurately exposes the fallacy of the contention as was again done by this court when the same case came before it. In 126 Cal., at page 274, the Supreme Court of that state said:

> "In this case, therefore, if any rights whatever can be conceded to the appellants, under the former Mexican government, such rights were in the nature of private property, or a right dependent upon the will and pleasure of the state or nation. If, as claimed, it were a right to possess, occupy and use land, that amounted to a title to property. It being a title or right to property, whether in fee simple or possessory merely derived from the Mexican government, under the Act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. If, on the other hand, it were a mere license at the pleasure of the former government to occupy the land, such right would not prevent that government from granting the land unencumbered with such right. This was the case in reference to pueblos under the former regime. The pueblos held title in trust for the use of the inhabitants, not conferred by special grant, but under the laws and regulations of Spain and Mexico, and there were many cases where such governments made spe-

> cific grants within the territorial limits of the pueblos which were, after the change of government, confirmed and patented by the United States, under the Act of Congress of 1851. The United States, succeeding to all the rights and sovereignty of Mexico, had such power to grant all public lands—that is, all lands not claimed by private parties; and if owned or claimed by private parties, and not presented for confirmation, the claims were waived or forfeited, and such lands thereafter became public lands."

Sufficient has already been said, we trust, to show that the attempt of learned counsel for appellant to distinguish *Barker v. Harvey* from the case at bar is utterly without merit. It is equally worthy of note that hardly an attempt is made to distinguish it from the line of cases we have referred to beginning with *Beard v. Federy, supra,* and extending over a period of thirty-six years which declare again and again the principles upon which *Barker v. Harvey* was decided and which rendered that decision inevitable.

Comments on Appellant's Brief.

Learned counsel for appellant present a lengthy argument on the nature and incidents of the alleged Indian title under the law of Spain and Mexico and assert that the title claimed for the Indians was not derived from or under the Spanish or Mexican law. We

shall not discuss at length the nature of the Indian rights, if any, under the law of Spain and Mexico, because we deem that subject relatively if not entirely unimportant in the present case. The important consideration here is that the claim of appellant that the rights of the Indians, whatever they may have been, during the time Spain or Mexico held sovereignty of California were not derived from the Spanish or Mexican law is unsound. Whatever may have been the Indian rights during the time Mexico was sovereign were derived from and existed by virtue of the law of that sovereign. We take it that nothing is more fundamental and that nothing can be clearer than the fact that title to or rights in or over real property exist only by virtue of law and that law is the law of the country which is sovereign over the territory. As was said by Chief Justice Marshall in Johnson v. McIntosh, 8 Wheat. 542, at 572:

> * * * "the title to lands, especially, is, and must be, admitted, to depend entirely on the law of the nation in which they lie."

If, therefore, the Indians had any right with reference to the land in question, whether mere license or what not, during the Mexican sovereignty over California, those rights were of

necessity derived from the Mexican law. It is quite immaterial what reason may have actuated Mexico in recognizing such rights, whether, as appellant contends, that recognition was based upon an appreciation of the moral claim due to the aboriginal possessors of the soil or what not. The fact is that in civilized society rights in or over real property can exist only by virtue of law and that law is the law of the sovereign. So whatever rights the Indians may have had, they were derived from the law of Mexico. When the sovereignty of California passed from Mexico to the United States, Congress enacted that all private claims to land derived or asserted under the law of the former sovereign must be presented before the tribunal which the new sovereign set up, to-wit, the Land Commission, and that claims which were not so presented should be deemed abandoned and lost. From this it follows with the complete certainty that the alleged rights of the Indians must have been presented before that commission and that if they were not so asserted, they were abandoned and lost. As has been shown, this principle is thoroughly established by the decisions of this court and has been recognized as the settled law for a quarter of a century.

As above stated, it seems to us that the present case does not involve the question or call

for the determination of what if any rights the Indians may have had under the law of Mexico. It may be worthy of note, however, that the most that can possibly be claimed is that they had a temporary right of occupancy revocable at the will of the sovereign; in other words, a mere license revocable at the pleasure of the government. This is the most that can be claimed even under the laws of Spain. If anything, the Indians had even less rights under the laws of Mexico. This is well pointed out in the opinion in *Hayt v. United States*, 38 Court of Claims, 455 (see particularly pages 461-462), but we shall not consume more time in the discussion of this question which, as stated, seems entirely immaterial in the present case. Whether the rights claimed for the Indians existed on account of their recognition by the general law of Mexico, in other words, whether to use the language in *Beard v. Federy, supra*, they rested "in the general law of the land," or whether they rested in whole or in part under the terms of the grant from the Mexican government, in either case they were derived from the law of Mexico and hence, as held by this court, were lost and abandoned if not presented to the Land Commission.

Counsel likewise argue at great length that the Act of 1851 should not have been construed as requiring the Indians' rights to be presented

to the Land Commission. Were this a case of first impression it might be proper to follow counsel through their elaborate argument and to endeavor to point out the fallacies therein. We might comment at some length upon the incongruity of the argument based upon the provision of the Mexican grant while at the same time asserting that the Indians' rights were not based upon the law of Mexico. We might advert to the patent fallacy of the argument that, because the Land Commission, with no claim of the Indians before it—used certain language in the opinion to the effect that the question whether the Indians had any rights was cognizable before another tribunal, such language constituted *res judicata*. We might indeed extend this brief to very considerable length. The fact is, however, that most if not all of appellant's arguments as to the construction of the act have been directly answered and overruled by this court and that it has construed the act in the manner indicated by the decisions to which we have referred and that such construction has stood for nearly a quarter of a century. In view of this we have not felt called upon to follow in meticulous detail all of the suggestions contained in appellant's brief. We have endeavored rather to point out that both upon principle and by direct and oft-repeated decisions of this court, the rules which control this

case have become and are thoroughly settled. Neither do we feel called upon to consume the time of the court in discussing many of the propositions of a general nature advanced by counsel, or in reviewing the large number of cases which they cite that discuss Indian reservations and other general matters having no direct bearing on the issues here involved. Neither do we feel called upon to advert to the *ad hominem* arguments set forth in appellant's brief. When California came under American sovereignty the question how the Indians should be treated was one for the political division of the Government. A certain rule was laid down. We do not deem it necessary or proper to enter into a discussion of whether a different policy should have been adopted by Congress.

Conclusion.

In conclusion, we wish again to call attention to the fact that this case, as strongly as any case that could well be imagined, presents a situation wherein the court should not reopen principles that have long been settled and have become rules of property. Only one who is familiar with the tremendous growth of California in the last twenty-five years can begin to appreciate the enormous number of people who have bought land and established homes in reliance upon the principles of law established by *Barker*

v. Harvey and the earlier decisions of this court to which we have referred. It would be difficult to conceive of the chaos that might result should this court now set aside and overturn those principles. The appellees' position in the case at bar therefore is sustained not only by those decisions and their inherent correctness, but as well by that great rule of public policy that principles of law dealing with title to real property, when once established and acted upon, should and must be held inviolate. As heretofore noted, these appellees acquired their title many years after the principles to which we have adverted had become settled. Thousands upon thousands of other persons have acquired like titles in like manner. Therefore, both because of the inherent correctness of the decisions to which we have adverted and because of the necessity of preserving inviolate rules of property so long established and acted upon, the decision of the learned District Court and of the learned Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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